In the Matter of	)	Date Issued: July 21, 1999
	)	Case No.: 1998-LHC-2029
DORA GARZA,	)	
Claimant	)	OWCP NO: 08-108891
	)	
v.	)	
	)	
AIR FORCE INSURANCE FUND	)	
HQ AFSVA/SVXCW,	)	
Employer	)	
	)	
AIR FORCE INSURANCE FUND	)	
HQ AFSVA/SVXBW,	)	
Carrier	)	
	)	

APPEARANCES:

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For the Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., and its extension, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 et. seq., 5 U.S.C. § 2105 (c) brought by Dora Garza (Claimant) against Air Force

Insurance Fund HQAFSVA/SVXCW (Employer) and Airforce Insurance Fund HQAFSVA/SVXBW (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on March 2, 1999 in San Antonio, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 52 exhibits which were admitted, including various claims records (CX-1), medical records and reports of Drs. Hilario Trevino, William E. Sanders, Edward A. Liske, Rafael Parra, Richard C. Senelick, David W. Gunzburger, Theodore Parsons, Jerjis J. Denno, Praful Singh, David Carrier, Roberto G. Rolfini, Jeremy Wiersig, Ernesto Blanco, Arie Herskovits, Ashwani Kapila, John F. Stoll, William T.Sullivan, Jorge Velez, Barbara Sullivan, Stuart F. Browne, and Aaron L Combs. (CXs 2-13, 22-29, 31-50); various vocational and physical rehabilitation reports (CXs 14-16, 19,20, 520; skilled nursing and physical therapy reports (CXs 17,18,21) and the deposition of Dr. Parra (CX-51).[1] Employer introduced 29 exhibits which were admitted including various claims and payment records (EXs 1,2), Claimant's personnel records (EX-2); various diagnostic records (EXs 4,5); functional capacity evaluations of therapists Janet K. Lopez, Patrick Kimball, Carolyn Ty Reyes, Thomas L. Jones (EXs 6-10); medical reports from Dr. Parra, Trevino, Fidel V. Exconde, Sanders, Senelick, Gunzburger, Parsons, Denno, Singh, Combs (Exs 11-26); and vocational rehabilitation reports of Brad Coffey. (Exs 27-29).

Post-hearing briefs were filed by the parties. Claimant's counsel attached to his brief a psychological assessment (mental status examination) of Claimant by psychologist William M. Erwin. which was performed on April 20, 1999. On June 10, 1999, Employer's counsel filed a motion to exclude Dr. Erwin's report on the grounds that report failed to contain the qualifications or credentials of Dr. Erwin and that it (1) was prevented from attending Claimant's examination by Dr. Erwin, (2) did not receive a copy of the report until June 4, 1998 which it received Claimant's brief and (3) was not provided with an opportunity to respond to such a report through its vocational expert, Brad Coffey. In a post hearing conference call of June 16, 1999, I granted Claimant's counsel a period of two weeks to furnish me with Dr. Erwin's credentials and gave Employer's counsel 30 days until July 16, 1999 to file Coffee's response to this report. The qualifications and response were subsequently received and made as part of this record as CX-53 and EX-30 respectively.[2]

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__p.__; Employer exhibits- EX-__p.__; Administrative Law Judge exhibit- ALJX-__p.__. Analysis of the record shows many duplicate records especially with regard to Claimant's medical treatment. Where the record contains duplicates references will generally be made to only one document.

[2] Having fully considered Employer counsel's motion to exclude Dr. Erwin's report together with Employer's response to the report, I find no reason to exclude Dr. Erwin's psychological assessment of Claimant.

Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated (Tr. 6-17) and I find:

1. Claimant was injured on June 9, 1992.

2. The injury occurred in the course and scope of Claimant's employment

3. An employer/employee relationship existed at the time of the injury.

4. Informal conferences were held on February 16, 1996 and March 6, 1997

5. Claimant's average weekly wage (AWW) at the time of the injury was $149.10[3]

6. Employer has paid temporary total benefits for varying time periods since the date of injury at the AWW rate of $149.10.

7. Claimant reached maximum medical improvement for her right elbow injury on April 20, 1994 and for her back injury on October 16, 1997.

II. ISSUES

The following unresolved issues were presented by the parties:

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[3] Although Claimant's counsel stipulated to the average weekly wage(AWW) prior to and during the hearing, he later questioned at the hearing the correctness of the AWW when Employer's counsel questioned Claimant about her previous employment as a maid which she claimed amounted to as much as 50 hours per week. . When I questioned Claimant's counsel if he had any payroll or other documentation showing the amount Claimant earned in the previous 12 month as a maid, Claimant's counsel said none existed whereupon I stated that I would not go behind the stipulated AWW based upon a 35 hour work week at $4.26 per hour which is what Claimant worked with Employer prior to her injury.

1. Extent of injury.

2. Availability of suitable alternative employment.

3. Loss of wage earning capacity.

4 Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

On May 21, 1992, Employer hired Claimant to work as a custodial work at Lackland Air Force Base in San Antonio, Texas. (EX-1, p. 6; EX-2, p. 1). Claimant worked the day shift making $4.26 per hour, 35 hours per week (EX-2, pp. 9, 10). On June 9, 1992, Claimant slipped and fell as she was walking down wet stairs injuring her right arm and back. (EX-1, p.1). Employer filed appropriate accidents forms the same day (EX-1, pp. 2-4). Claimant was initially treated for a soft tissue injury of the right hip and low back sprain at Wilford Hall, USAF, Medical Center and restricted to lifting no more than 10 pounds with no twisting, climbing, or bending activities. (EX-1, p.5).

Following the injury Claimant underwent treatment for her right elbow injury by Dr. Trevino. Records of Dr. Trevino's treatment show the following: On July 28, 1992, Dr. Trevino examined Claimant for persistent right elbow pain aggravated by use of the right hand. The examination showed considerable tenderness over the lateral compartment, lateral condyle and head of the radius with positive tinel and Phalen test indicate of carpal tunnel syndrome. Dr. Trevino diagnosed traumatic tennis elbow and carpal tunnel syndrome, prescribed continued use of Flexeril and Fioricent and placed Claimant's elbow in a brace. (CX-2, p. 1).

Claimant continued having problems with her elbow and made return visits to Dr. Trevino on August 7, 27, September 3, 10 , 18, 24, and October 1, 1992. Notes from these visits reflect that Claimant failed to respond to conservative treatment with included medication, brace and injections of Marcxaine and Depomedrol. Neither use of the brace or medications provide Claimant any significant pain relief, and thus Dr. Trevino recommended treatment by surgeon, Dr. Sanders. (CX-2, pp. 2-4).

Dr. Sanders initially saw Claimant on October 6, 1992. His examination revealed subluxation of the ulnar nerve with a positive nerve compression test with a positive carpal tunnel and Tinel test. As a diagnostic trial Dr. Sanders injected the lateral epicondyle with Marcaine and dexamethasone without any pain relief and provided Claimant with a protective elbow pad. Claimant return for additional treatments on October 20, December 2, 1992, and February 3, 1993. Claimant failed to respond to conservative treatment and by the last visit Dr. Sanders suspected that Claimant who was

noted to be suffering from overlying depression would have to undergo a medial epicondylectomy. On March 1, 1993, Claimant underwent an examination under anesthesia at St. Lukes Hospital and as a result of that examination under subsequent surgery on March 22, 1993 involving neurolosis of the radial nerve, excision of the extensor, recession of the conjoined tendon and a lateral epicondylectomy. (CX-3, p. 6; CX-4, pp. 1, 2).[4]

Claimant initially experienced less pain as a result of the surgery and made follow up visits to Dr. Sanders on April 1, May 4, June 8, July 15, and August 12, 1993. Records from these visits show Claimant experiencing radiating pain down the ulnar forearm and arm with a subluxing ulnar nerve and a marked Tinel's test. By the August 12, 1993 visit EMG testing showed changes in the hypothenar muscles with objective evidence of a cubital tunnel syndrome. (CX-3, p. 10). On August 20, 1993, Claimant underwent a neurolysis of the ulnar nerve (medial epicondylectomy) at St. Luke Hospital. (CX-5). This was followed by office visits on August 31, October 5, 28, December 7, 1993 and January 18, February 22, April 6, 20, and November 9, 1994. (CX-3, pp. 11-18).

By the April 20, 1994 office visit Dr. Sanders pronounced Claimant at MMI noting right elbow weakness with a 10 % right upper extremity impairment plus an additional 4% upper extremity impairment or a 7% whole body impairment with a 30 degree extensor lag following the two surgeries. (CX-3, p.18). In evaluating Claimant's right arm limitations Dr. Sanders referred to a functional capacity evaluation apparently done at the Upper Extremity Work Center Referral. The last evaluation at that Center showed Claimant restricted from repetitive activity with the right arm with lifting limited to between 8 to 13 pounds and no overhead lifting and maximum two handed lifting and carrying at waist level to 22 pounds. (CX-16, pp.17; EX-8).

Concerning her back condition the records are more voluminous and show Claimant initially seeking treatment from Dr. Parra on June 16, 1992. On that visit Claimant was in acute distress with evidence of paravertebral muscle spasms and limitations in forward and lateral back motion. Straight leg raising was positive bilaterally at 40 degrees with a positive LaSeque and decreased ankle jerk. Claimant made return visits on August 27, October 20, and December 20, 1992 during which time she demonstrated spinal muscle spasms with limitation of forward and lateral back motion despite conservative care. (CX-7, pp. 1-7). Diagnostic records from June 6, 1992 to July 29, 1993 which included lumbar and cervical MRIs and myleograms showed evidence of congenital abnormalities with desiccation at L5-6 and L6-S1, spina bifida occulta, with moderate to severe narrowing at C5-6 (EX-4). On December 21, 1992 and August 24, 1993, Employer had Claimant evaluated by neurologist, Dr. Senelick. After the first evaluation Dr. Senelick stated that Claimant had exaggerated pain responses with symptom magnification and no need for surgery with her only limiting condition being her right elbow with Dr. Senelick deferring to Dr. Sanders regarding elbow limitations. By the next evaluation of August 24, 1993, Dr. Senelick stated that Claimant's lumbar

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[4]On October 21, 1992, Dr. Sanders referred Claimant for neurological testing to Dr. Liske who after conducting nerve conduction studies found subtle changes on the right side suggesting an elbow grove or cubital tunnel location. (CX-6).

soft tissue had resolved with no residual impairment. (EX-15).[5]

On June 4, 1996 Claimant resumed treatment with Dr. Parra with Claimant complaining of low back pain radiating to the left lower extremity. On examination there was evidence of paravertebral muscle spasm with limitation of forward and lateral back motion. Dr. Parra prescribed use of a brace and further diagnostic evaluation. (CX-7, p. 8). Thereafter, he saw Claimant on July 2, 6, 16, August 20, 1996 noting that as of the July 6 there was diagnostic evidence of a herniated disc at L5-S1 with degeneration. (CX-7, p. 18). Because of persistent left lower extremity radiculopathy, Claimant underwent a posterior lumbar interbody fusion on September 4, 1996. (CX-7 p. 20, CX-45). This surgery was followed by follow up visits on September 17, 24, October 1, 1996. Because of severe right lower extremity radiculopathy secondary to protrusion of the graft into the right foramina, Claimant underwent a second lumbar fusion on October 6, 1996. (CX- 46).

Following the second lumbar fusion Claimant saw Dr. Parra on October 24, November 14, December 12, 1996 and February 13, March 25 and April 22, 1997 at which time it became apparent that the fusion had failed for a second time resulting in pseudoarthrosis and requiring a 3 fusion due to persistent low back pain radiating into the right lower extremity. (CX-7, p. 28). Visits on May 20**,** June 10, 1997 confirmed the need for the 3rd fusion which was done on June 16, 1997. (CX-7, p. 32, CX-47). On July 8, 1997, Claimant underwent a 4th procedure involving a debridement of the wound for a CSF leak. (CX-7, p.33, CX-48). This was accompanied by follow up visits on July 31, August 28, September 18, October 21, 1997. Notes from the last visit of October 21, 1997 show Claimant at MMI for her back effective October 16, 1997, with an inability to return to her former work and a need to undergo pain management and vocational rehabilitation. The October 16, 1997 impairment rating report listed Claimant with a 35% total body impairment. (CX-7, pp. 37-39).

On March 19, 1998, Dr. Parra filled out an work restriction evaluation (OWCP-5) indicating Claimant could sit for 1 hour a day in 10 minute intervals, walk one hour with lifting limited to 10 to 20 pounds with no bending, squatting, climbing, kneeling, or twisting and with limitations on simple grasping and fine manipulation, and avoidance of heat and extreme cold with no more that 4 hours work per day**.** (CX-7, p. 40). On June 25, 1998, Dr. Parra filed out a disability certificate stating that Claimant had been under his care from June 16,1992 to present and was totally incapacitated at that time and was to stay off any work activities. (CX-7, p. 41).

In addition to Dr. Parra's treatment, the record contains skilled nursing care administered to Claimant on separate occasions from September 16, 1996 to October 23, 1996; June 21, 1997 to September 12, 1997 with physical therapy and rehabilitation from October 16, 1996 to November 7, 1996 and February 26, 1997 to September 30, 1997. (CXs 17,18, 19, and 21). Also, there are various diagnostic records in CTs, MRIs, X-rays, myleograms in the record confirming Claimants back impairment. (CXs 22-44).

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[5]On February 8, 1993 Claimant underwent a psychological assessment by Dr.Gunzberger. Dr. Gunzberger found no evidence of any psychological dysfunction and no over concern for physical disorder or malingering. (EX-17).

B. Claimant and Rosemary Garza's Testimony

Claimant, a 41 year old female with a 10 grade education, credibly testified about her conditions. (Tr. 70). Claimant testified that since her injury she has suffered with severe arm, leg, and back pain resulting in multiple arm and back surgeries. As a result of her last back surgery, Claimant had to spend a month in bed with her legs elevated and has suffered from depression requiring prescription medication from Dr. Parra. Claimant is right handed and is unable to pick up anything except light objects such as pot and pans in her right hand. Because of right arm pain she is unable to lift her right hand up to her head. (Tr. 41-45, 47, 48).

Claimant testified that she is not able to drive a car because of foot numbness and electrical shocks in her legs that prevents her from feeling the pedals. Heat and cold aggravate her condition**.** She needs a cane to walk and is unable to bend, squat, climb, kneel or twist. (Tr. 49-52). Concerning her ability to work, Claimant denies being able to even work 3 hours a day because of her back and arm condition which cause her constant and severe pain. (Tr. 52-53).

Claimant's daily activities include getting up at 7 a.m., putting a pot of coffee on the stove and attempting to wash a few dishes and putting some clothes in the washer. Because of leg pain, numbness and shocking sensations, Claimant is required to lie down about 9 hours per day . (Tr. 79-82).

Claimant's testimony about her limitations was confirmed by her 21 year old daughter, Rosemary Garza, who lives with Claimant. Rosemary Garza testified that she does most of the house work including cooking, cleaning, washing, vacuuming, sweeping, and making beds due to her mother's condition. Rosemary Garza confirmed the fact that her mother has to lie down most of the day because of her condition. (Tr. 98-105).

C. Testimony of Dr. Parra

Dr. Parra, a neuro and spine surgeon, testified that he initially treated Claimant for neck pain that Claimant experienced on February 10, 1986, when lifting groceries. On that occasion, Claimant herniated a disc and underwent surgery. Subsequently, in 1992, Claimant suffered a totally unrelated injury to her back and elbow. The spinal injury was at L4-5 and L5-S1. (CX-51, p. 10). Dr. Parra noted that as of June 4, 1996 Claimant was continuing to complain of muscle spasms and on September 4, 1996 underwent a posterior lumbar interbody fusion. (CX-51, p. 15).

In describing Claimant's condition Dr. Parra stated:

> Well, this is a very complicated case just to start with. She has a very serious problem with the lower back. She has a disc herniation there and she has an operation. She got a complication after the operation. She never regained full activity and full

> function of the lower back. She has a lot of scar tissue there and she has up to operation time--just being complaining of severe low back pain and severe leg pain and has been since the beginning. **(**CX-51, p. 17 ll. 2-10)**.**

Dr. Parra then described follow up treatment of Claimant with additional surgeries and complications and stated:

> Well this is a very difficult patient. This is a patient who has multiple operations, multiple problems with the lower back and a very high impairment disability. I think that this is a patient that I have tried several times to send her back to some kind of work, but I think she's unable to do any kind of work because of pain**.** (CX-51, p. 22 ll. 7-13).

Concerning Claimant's ability to do even part time work Dr. Parra testified that he did not believe that Claimant could do such work. (CX-51, pp. 24, 25, 26). On cross, Dr. Parra indicated that Claimant was taking considerable medication for her back condition and imposed the following limitations: no vehicle operation unless manual instrumentation is provided; lifting 10 pounds or less intermittently; sitting for no more than 20 to 25 minute intervals for a total of one hour per day; standing for no more than 1 hour per day; no bending, squatting, twisting, kneeling and occasional climbing for a total of no more than 3 hours of activity per day. (CX-51, pp. 35-40, 47).

On cross, Dr. Parra elaborated further about Claimant's restrictions in response to the following question:

> Q. Now I know you mentioned that the claimant could intermittently stand, sit and walk. Of course, there were a lot of other things she couldn't do, like bending and squatting and that type of thing. But within the restrictions of sitting and standing and walking, can the claimant work 4 hours a day in a sedentary type of job?
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> A. Now, in June of 1998, I said that she could work four hours a day in a report that I sent to the insurance company. And I got with her after that and I talked to her and discussed wit her, and this is a patient that is— practically cannot do anything with her back. She's constantly having pain. So even I say four hours a day then, I think that probably she won't be able to probably do more than one or two hours a day using her back without any medication at all. I think this is a person that has a serious problem with her lower back, a serious disability with her lower back and serious--and very unable to perform any physical type of work (CX-51, p. 42 ll. 18 to p. 43 ll. 11).

D. Claimant's Mental Status Examination

After the hearing and in view of both the medical records and Claimant's testimony which was indicative of depression, Claimant underwent a mental status examination by psychologist William

M. Erwin. Ph.D. on April 20, 1999. Claimant appeared obviously depressed which was substantiated by her psychometric profile. Dr. Erwin noted that although Claimant's language and speech were within normal limits they were halting at times with evidence of mild confusion. Dr. Erwin noted that Claimant may exaggerate some of her symptoms due to severe emotional distress that she has experienced in the past and that Claimant suffered from recurrent major depression without psychosis with a dsythymic overlay. Dr. Erwin also noted that even without her disabling injury she was prone to periods of emotional, cognitive and behavioral dysfunction but that because of her limited coping skills, her injury exacerbated any underlying personal dysfunction.

During the examination Claimant displayed limited social skills, detached from social interaction with feelings of helplessness and worthlessness that had been prominent since her injury. Dr. Erwin opined that Claimant may have become sufficiently withdrawn to make it difficult to "mobilize sufficient strength to meet the demands of working on a regular basis." Further "while she is inclined to suppress events and feelings that stir disturbing memories, her recollections of her life prior to her injury invade her consciousness with sufficient frequency to make it difficult for her to sustain her concentration on most tasks that would be required of her at work. Interpersonal contact is difficult for her even though she is desirous of such contact."

In the last paragraph of the report Dr. Erwin provided the following prognosis:

> At the present time, the prognosis for Ms. Garza has to be guarded to poor. She has been unable to find more than temporary relief from her pain and she has been told by one of her physicians that nothing further can be done. Her impairment from the pain is widespread. She no longer drives and she can not do many of the things which she found to be rewarding prior to her injury. Her depression is almost constant and she had not yet found satisfactory relief. Medication likely will be useful in the amelioration of some of here more severe depressive symptoms, but the feelings of worthlessness likely will remain for some time. Psychotherapy could prove to be beneficial, but success in such an endeavor will be difficult to attain because of her mistrust of others and her avoidant behavior.
>
> (CX-53)

E. Employer's Exhibits and Testimony of Brad Coffey

In support of its position Employer introduced and relied upon the medical reports of Drs. Senelick (EX-15), Parsons (EX-19), Combs (25) plus the findings of most recent functional capacity evaluation by Health South (EX-10). Dr. Senelick perform two spinal examinations of Claimant on June 9, 1992 and August 24, 1993 at Employer's request. On the initial examination Dr. Senelick found Claimant cooperative but allegedly exaggerating pain responses due to a soft tissue back injury which in his opinion did not require surgery but rather aggressive exercise and no apparent

limitations. On the second exam Dr. Senelick stated Claimant told him her back had dramatically improved with only mild pain when attempting housework. Dr. Senelick found no impairment with a complete resolution of her back problems.

When Dr. Parsons examined Claimant on March 16, 1996 he had no imaging studies for review but found Claimant to be status post right medial and lateral epicondylectomy of the right elbow with residual stiffness and discomfort, mild lumbar spondylosis with transitional vertebrae and severe chronic pain syndrome with significant functional overlay. Dr. Parsons strongly recommended referral to a physical medicine and rehabilitation physician to deal with her chronic pain syndrome and found her able to do sedentary work.

On February 3, 1999, Dr. Combs examined Claimant at the request of Employer and diagnosed lumbar spondylosis, status post multiple lumbar surgeries, right elbow sprain/strain and chronic pain syndrome. He found Claimant had reached MMI as of October 16, 1997 and demonstrated inconsistent and/or submaximal effort with an ability to intermittently sit 8 hours per day, walk 2 hours, lift 1 hour, squat 1 hour, stand 2 hours. He limited Claimant to lifting between 10 to 20 pounds with intermitted reaching above the shoulder and no operation of vehicle as part of work duties.

The functional capacity evaluation performed at Healthsouth on March 13, 1998 showed an inability to fully evaluate Claimant secondary to high perceived pain levels with a Waddell test score in the maximum range for alleged "magnified illness behavior". The therapist performing the evaluation recommended that Claimant return to her physician for "final recommendations".

Besides relying upon the opinions of Drs. Senelick, Parsons, Combs and the therapists at Healthsouth, Employer called Brad Coffey as a witness and introduced his vocational rehab reports and labor market surveys for July -September 1998, February 5, 1999, and January- February 1999. Coffey's initial report showed Claimant's counsel refusing to cooperate by allowing Coffey to make his services available to Claimant to "minimize the effects of disability." (EX-27, p. 7). On July 18, 1998 Coffey submitted his initial labor market survey showing the following jobs that allegedly fell within the restrictions established by Dr. Parra on the June 18, 1998 physical capacities assessment: office clerk (Com-Stat), part time (24 hours) at $5.50 per hour; receptionist/clerk (Micro Specialists), full time (40 hours) at $5.15 per hour; front desk clerk (Relay Station Motel), full time (40 hours) at $5.75 per hour. (EX-27, pp. 22-24). On July 27, 1988, Coffey submitted a second labor market survey showing the following jobs allegedly within Claimant's restrictions: general office worker (Southwest Propane), full time (40 hours) at $6.00 per hour; customer service representative (H.R.& M), full time (40 hours) at $6.00 to $7.00 per hour; receptionist (Keller Carpets), full time (40 hours) at $6 to $7 per hour; dispatcher (NACOM), full time (40 hours) at $6.40 per hour; clerical assistant (Austin Bridge & Road), full time (40 hours) at $7.00 to $8.00 per hour. (EX-27, pp. 25,26).

On August 13, 1998 Coffey submitted the survey to Dr. Parra for his approval on the above jobs. In response Dr. Parra disapproved of all full time jobs based upon Claimant's pain and physical limitations. Dr. Parra indicated Claimant could possibly do part time work with alternate sitting and standing but noted that full information about patient's condition should be discussed with

prospective employers. (EX-27, pp. 32-37). On August 25, 1998, Coffey determined based upon Dr. Parra's response that Claimant could still perform part-time work at Nacom, Com-Stat and Micro Specialists involving dispatcher, office clerk, receptionist/clerk. (EX-27, p. 41). On September 2, 1998, Coffey submitted a third labor market survey showing the position of customer service associate with Bank One at 20 hours per week, $8.25 per hour available and suitable for Claimant (EX-27, pp. 43,44). This was followed by a fourth labor market survey of September 7, 1998 showing the following jobs allegedly suitable and available for Claimant: receptionists (Edwards Aquifier Authority), part-time (20 hours) at $7.50 per hour; inbound marketing sales representative (West TeleServices Corporation), part time (4 hours per day) at $7.00 to $12.00 per hour. (EX 27, p. 45, 46).

On February 5, 1999, Coffey prepared a 5th labor market survey showing jobs allegedly suitable and available for Claimant based upon additional restrictions imposed on January 15, 1999 by Dr. Parra which included: lifting 10 pounds or less intermittently or occasionally, sitting intermittently 1 hour per day, standing intermittently 1 hour per day, walking intermittently 1 hour per day, no bending, squatting, twisting, kneeling, and occasional climbing with a 3 hour per day limit. These jobs included: telemarketer at home (Clothing Etcetera), part time (3 hours per day) at $6.00 per hour; phone worker at home (Medina Children's Home), part time (3 hours per day) at $5.15 to $8.50 per hour; telemarketer (Jobs for Disadvantaged), part time, (3 hours per day, 6 days per week) at $6.00 per hour; phone worker (Ultimate Carpet Cleaning), part time (3 hours per day) at $5.50 per hour; telemarketer (Airtron), part time (3 hours per day,. 5 days per week) at $90 per week; telemarketer (Texas Teleservices), part time (3pm,-6pm, 6 days per week) at $103.50 per week. (EX-29).

Coffey's testimony essentially tracked his labor market surveys indicating Claimant's lack of cooperation and his review of the medicals and conferences with Dr. Parra on June 18, 1998 and August 1998. Coffey testified that he continued to do labor market surveys in response to additional restrictions imposed by Dr. Parra with the most recent coming at his deposition. (Tr. 118,-122, 126, 127, 128, 131-152). In Coffey's opinion, Claimant even with the most severe restrictions imposed by Dr. Parra Claimant could still do the in home, sedentary, telemarketer jobs identified in the last survey. (Tr. 152-165). On cross, Coffey admitted that the positions outside the home would not be available if Claimant could not drive even a modified car or obtain transportation and more importantly even the telemarketer jobs required good interpersonal skills and the ability to persuade others. When questioned about whether Coffey would recommend the telemarketer positions for someone suffering from depression, Employer's counsel interrupted and Coffey never answered the question. (Tr. 179, 180).

In a report dated July 14, 1999, Coffey listed the essential functions of telephone soliciting which included: communicating with persons outside the organization, establishing and maintaining relationships, selling or influencing others, performing for or working with the public, and monitoring and controlling resources. Coffey then stated that the telephone soliciting occupation would apparently be "difficult" according to Dr. Erwin. However, Coffey noted that Dr. Erwin made no explicit statement that the essential job functions would be impossible. (EX-30).

IV. DISCUSSION

A. Contention of the Parties

Although Claimant counsel's brief is poorly organized and thus difficult at times to follow it appears that the trust of his argument is that Claimant is entitled to temporary total disability benefits from the date of her injury, June 9, 1992 until the present since she has not been able to perform her past job or any other work because of her medical condition.[6]

Employer concedes that Claimant met her initial burden of showing an inability since her June 9, 1992 injury to return to her former employment but contends that it has shown the availability of suitable alternative employment by jobs identified in Coffey's labor market surveys of July, August, and September 1998 and a subsequent survey in January 1999. Employer contends that I should consider Claimant's allegedly unreasonable refusal to cooperate with Coffey, Dr. Parra's non-treatment of Claimant from December 10, 1992 to June 4, 1996 plus the opinion of Drs Senelick, Parsons and Combs and the functional capacity evaluation of Healthsouth in March 1998 when considering the appropriateness of the jobs identified by Coffey in 1998 and 1999.

B. Credibility of Witnesses

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Bitton , 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d), and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

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[6] Claimant's counsel at page 7 of his brief incorrectly refers to the date of injury as June 8, 1992 when it is clear that the accident occurred on June 9,1992.

C. Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that the claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view towards improving his condition, Leech v. Service Engineering Co., 15 BRBS 18 (1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

Once the prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of

realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). However, an employer offered position does not constitute suitable employment if is found to be too physically demanding for Claimant to perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to the claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If the claimant fails to satisfy this "complementary burden", there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In this case the parties stipulated that Claimant injured her right elbow and back of June 9, 1992 in the course and scope of her employment and that MMI was not reached for the elbow impairment until April 20, 1994 with MMI for the back injury occurring on October 16, 1997. Inasmuch as the medical records support these MMI dates I find that Claimant established permanent disability for the right elbow on April 20, 1994 and for her back on October 16, 1997.

The overriding question is whether Claimant who admittedly has never been able to perform her past work as a maid or janitor is capable of performing any other suitable alternative employment considering her overall physical and mental condition. Concerning her physical condition Dr. Parra has continually revised his limitations on Claimant as his treatment for her back condition has continued with current limitations restricting Claimant to no more than 3 hours of activity per day, lifting 10 pounds or less intermittently, sitting for no more than 20-25 minute intervals for a total of one hour per day, standing for no more than 1 hour per day with no bending, squatting, twisting, kneeling and occasional climbing and avoidance of heat and cold. In addition, Claimant testified that she is required to lie down 9 hours per day because of pain. I credit Claimant's testimony and find that in addition to Dr. Parra's limitations Claimant is required to lie down as she testified which testimony was supported by the credible testimony of her daughter.

Considering these limitations alone, I find that Coffey has failed to present suitable alternative jobs which Claimant can perform. While Coffey claimed that Claimant could perform the telemarketer in home jobs with Dr. Parra most severe restrictions, he failed to account for Claimant's pain limitation which he treated as an exaggeration. Since neither Dr. Parra or Dr. Erwin indicate any conscious attempt at malingering and I find Claimant's pain complaints to be consistent with her treating records, I find that Employer has failed to provide evidence of any suitable alternative employment and thus I find that Claimant is totally disabled and has been so since her injury.

Regarding the issue of total disability, I credit Dr. Erwin's psychological assessment of Claimant's condition. Contrary to Employer's assertion, I did not raise this issue sua sponte. Rather, Claimant testified about being depressed and her medical records from Dr. Sanders (CX-3, p. 5) and Dr. Parra (CX-7, p. 40) indicated Claimant suffering from depression which affected her interpersonal skills. Dr. Erwin plainly indicates that Claimant because of poor coping skills and depression had limited ability to concentrate or interact with others, thus even further restricting her ability to work and making the jobs listed by Coffey to be inappropriate.

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. Director, OWCP v. Potomac Elec. Power Co., 607 F.2d 1378 (D.C. Cir. 1979); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); American Nat'l Red Cross v. Hagen, 327 F.2d 559 (7th Cir. 1964). Psychological impairments have included depression due to a work-related disability Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984); anxiety conditions Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979); headaches Spence v. ARA Food Service, 13 BRBS 635 (1980). Where a work-related accident has psychological repercussions it is also compensable. Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976); Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778 (1981); Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979).

In finding Claimant totally disabled I have considered the opinions of Dr. Senelick, Parson and Combs as well as the therapists at Healthsouth but find them of little value since they failed to appreciate or understand the severity of Claimant's back condition as more properly assessed by Dr. Parra, Claimant's primary treating physician, nor did they consider Claimant's underlying mental problems.

V. INTEREST AND ATTORNEY FEES

Claimant is entitled to an award of interest on all outstanding benefits. Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), *on recon.*, 17 BRBS 20 (1985).

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provide for approval of attorney's fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees. A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

1. Employer shall pay to Claimant compensation in accordance with Section 908(b) of the Act for temporary total disability based upon an average weekly wage of $149.10 from June 9, 1992 to April 20, 1994 when Claimant reached maximum medical improvement.[7]

2. Employer shall pay to Claimant compensation in accordance with Section 908(a) of the Act for permanent total disability based upon an average weekly wage of $149.10 from April 21, 1994 to the present.

3. Employer is entitled to a credit in the amount of $32,482.50 for 88 payments made through February 1, 1999. (EX-3, pp. 6, 8). Although Employer claimed payment of compensation up to the hearing I am unable to find any payment records to reflect such payments. In addition there were periods of time in which no apparent compensation was paid. They include the following: July 19, 1994 to May 20, 1995; October 20, 1995 to March 15, 1996. (EX-1, p. 21).

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[7] Claimant reached MMI for her right elbow injury on April 20, 1994. This injury which happened in conjunction with here back injury and accompanying depression prevented Claimant from performing any kind of work.

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgement in accordance with 28 U.S.C. §1961. August 29, 1995, will be used as the date of Employer's knowledge of Claimant's injury.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 21st day of July, 1999, at Metairie, Louisiana.

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CLEMENT J. KENNINGTON
Administrative Law Judge